IN THE SUPREME COURT
STATE OF MICHIGAN
APPEAL FROM THE MICHIGAN COURT OF APPEALS

TOTAL PETROLEUM INCORPORATED,
Self-Insured,

Defendant-Appellant,

v

JEFFREY L. FRAZZINI,

Plaintiff-Appellee,

and

AAA OF MICHIGAN,

Intervening Plaintiff-Appellee,

Supreme Court Case No. 119362
Court of Appeals No. 223684

Lower Court: WCAC
Docket No: 98-000260

BRIEF ON APPEAL - APPELLANT TOTAL PETROLEUM

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STATEMENT OF THE BASIS OF JURISDICTION

The Michigan Supreme Court's jurisdiction in this case is premised on MCR 7.302. This appeal arises out of a claim for workers' disability compensation benefits which was tried before Magistrate Grattan, who issued his opinion on October 11, 1998. The Appellant, Total Petroleum, Inc. ("Total Petroleum") filed a claim for review with the Workers' Compensation Appellate Commission ("WCAC") which issued a decision on October 26, 1999 reversing the Magistrate's decision. The Plaintiff/Appellee appealed this decision in the Michigan Court of Appeals which in turn reversed the WCAC's decision on May 11, 2001. On June 1, 2001, Total Petroleum filed an Application for Leave to Appeal in a Michigan Supreme Court. On January 23, 2002, the Michigan Supreme Court granted Total Petroleum's Application for Leave to Appeal.

THE STATEMENT OF QUESTIONS INVOLVED

I. **WHETHER THE DECISION OF THE MICHIGAN COURT OF APPEALS CONFLICTS WITH THE MICHIGAN SUPREME COURT CASE OF *VAN GORDER V PACKARD MOTOR CAR CO*, 195 MICH 588; 162 NW 107 (1917).**

SINCE THE MICHIGAN COURT OF APPEALS DID NOT DISCUSS THE *VAN GORDER* DECISION, IT IS DIFFICULT TO SPECULATE HOW THE COURT OF APPEALS WOULD HAVE TREATED THIS ISSUE.

THE WORKERS' DISABILITY COMPENSATION APPELLATE COMMISSION WOULD LIKELY ANSWER THIS QUESTION: **YES**

IT IS UNCERTAIN HOW THE MAGISTRATE WOULD ANSWER THIS QUESTION.

THE PLAINTIFF-APPELLEE ANSWERS THIS QUESTION: **NO**

THE INTERVENING PLAINTIFF-APPELLEE WOULD LIKELY ANSWER THIS QUESTION: **NO**

THE DEFENDANT-APPELLANT ANSWERS THIS QUESTION: **YES**

II. **WHETHER THE COURT OF APPEALS DECISION VIOLATED THE APPELLATE STANDARD OF REVIEW FOR A DECISION ISSUED BY THE WORKERS' DISABILITY COMPENSATION APPELLATE COMMISSION?**

THE MICHIGAN COURT OF APPEALS WOULD ANSWER THIS QUESTION: **NO**

THE WORKERS' DISABILITY COMPENSATION APPELLATE COMMISSION WOULD LIKELY ANSWER THIS QUESTION: **YES**

THE MAGISTRATE WOULD LIKELY ANSWER THIS QUESTION: **NO**

THE PLAINTIFF-APPELLEE WOULD ANSWER THIS QUESTION: **NO**

THE INTERVENING PLAINTIFF-APPELLEE WOULD ANSWER THIS QUESTION: **NO**

THE DEFENDANT-APPELLANT ANSWERS THIS QUESTION: **YES**

III. **WHETHER THE COURT OF APPEALS DECISION MISAPPLIED THE PERSONAL RISK DOCTRINE AS EXPRESSED IN *LEDBETTER V MICHIGAN CARTON CO*, 74 MICH APP 330; 253 NW2d 753 (1977)**

THE MICHIGAN COURT OF APPEALS WOULD ANSWER THIS QUESTION: **NO**

THE WORKERS' DISABILITY COMPENSATION APPELLATE COMMISSION WOULD ANSWER THIS QUESTION: **YES**

THE MAGISTRATE WOULD ANSWER THIS QUESTION: **NO**

THE PLAINTIFF-APPELLEE ANSWERS THIS QUESTION: **NO**

THE INTERVENING PLAINTIFF-APPELLEE ANSWERS THIS QUESTION: **NO**

THE DEFENDANT-APPELLANT ANSWERS THIS QUESTION: **YES**

INTRODUCTION

An employer is not an insurer of all events that occur during employment. If it were otherwise, then the Michigan Legislature would have simply drafted a worker's compensation statute which made all claims compensable if they arose during the course of employment, but the Legislature wrote the law differently. For a claim to be compensable under Michigan's Workers' Disability Compensation Act, MCL 418.301, MSA 17.237(301), it must satisfy two elements – it must "**arise out of** employment and **be in the course of employment**".

At issue in this appeal is the application of the first element, "arising out of." This phrase is not superfluous. It establishes the requirement that the origin of a casual event for worker's compensation must have some connection, some nexus to the work environment. It is not sufficient that an injury merely occur during the course of employment.

The personal risk doctrine is the legal prodigy of the "arising out of" element. This doctrine instills "arising out of" with force and effect. Statutory inclusion of the phrase "arising out of" makes the doctrine of personal risk vitally important for apportioning responsibility between the employee and employer for injuries whose origins have only a tenuous connection to the work environment.

This appeal presents a fact situation which did not arise out of the employment. It is undisputed that the employment did not cause or contribute to the plaintiff's disease of diabetes, nor did the employment cause or contribute to his hypoglycemic reaction which was the immediate cause of his automobile accident that resulted in his injury. Notwithstanding the uncontroverted facts, the Court of Appeals determined that the plaintiff's injury, caused by his personal illness of diabetes, was compensable under Section 301 of the Act. The Court of Appeals decision vitiated the personal

risk doctrine and improperly moved the Workers' Disability Compensation law closer toward a realm of strict liability that is incompatible with the statutory concept of "arising out of employment." If the employer is to be the insurer of all events, then the Legislature could have simply omitted the "arising out of" language from the statute, but it did not.

STATEMENT OF FACTS

The plaintiff is an insulin-dependent diabetic. At the time of the events in this case, he took regular injections of insulin. According to the medical documentation, the plaintiff's failure to properly monitor his blood sugar could result in a hypoglycemic diabetic reaction.

On May 19, 1994, plaintiff sustained an injury in a single motor vehicle accident. As found by the Magistrate, WCAC, and the Court of Appeals, the direct and immediate cause of the plaintiff's motor vehicle accident was a hypoglycemic reaction which was directly related to his disease of diabetes. (376a, 392a, & 404a).

It is undisputed that the Appellant, Total Petroleum, did not cause or contribute in any way to the plaintiff's personal disease of diabetes. Neither did Total Petroleum cause or in anyway contribute to his hypoglycemic reaction. Total Petroleum had absolutely no control over how the plaintiff monitored his blood sugar or how the plaintiff monitored his medications. There is no evidence that Total Petroleum's work environment in any way caused, contributed to, or initiated the automobile accident. (393a - 394a).

Total Petroleum operates a number of gas stations/convenience stores throughout the State of Michigan. The plaintiff began working for Total Petroleum as a cashier in October of 1992, and in February of 1994, Total Petroleum promoted him to a manger position of a gas station unit. As part of his management responsibilities, the plaintiff made bank deposits. According to the plaintiff,

he typically made two bank deposits during the course of the day, one in the morning and a second one in the afternoon. (50a).

The plaintiff testified that he made two bank deposits on the day of the accident. He made the first bank deposit at 10:30 a.m. The plaintiff stated that he intended to go to the bank again at 2:00 p.m. and then to a Walmart store, located approximately three miles down the road from the bank, to pick up some supplies. (188a - 189a, 306a). For some inexplicable reason, the plaintiff actually traveled several miles past the Walmart store before his accident occurred. (386a).

The plaintiff stated that he had an insulin reaction which caused his accident and resultant injuries. Dr. Gary S. Ferenchik, who treated the plaintiff's diabetes post-accident, testified in his deposition that the plaintiff's accident was most likely caused by the plaintiff's hypoglycemia, a condition associated with his diabetes. (62a).

The plaintiff initially claimed this incident as a non-work related no-fault insurance accident. On the day the plaintiff was discharged from the hospital, May 28, 1994, he voluntarily signed an application for no-fault insurance benefits. The plaintiff admitted that on this application that the accident did not arise from his employment.[1] (349a - 350a). The plaintiff received at least two years of no-fault wage loss benefits.

The plaintiff waited until May of 1996 to file his claim for benefits, just prior to the two year statute of limitations for filing a claim under the Michigan Workers' Disability Compensation Act. This belated filing was Total Petroleum's first notice that the plaintiff was claiming his automobile accident was work related. (271a, 272a). Prior to that time, Total Petroleum had no information

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[1]The plaintiff contended that it was actually his mother, Donna Frazzini, who filled out the information that he had no idea from whom she obtained the information for the form. At trial, his mother did not recall filling out the form. (240a).

from the plaintiff or from any other source suggesting that the plaintiff's diabetic condition posed a hazard to his driving an automobile. In fact, there is no evidence in the record indicating that the plaintiff even had a restricted license.

LEGAL PROCEEDINGS

Total Petroleum contested the plaintiff's claim for workers' disability compensation benefits. The case was tried on January 15, 1998 with a continued trial date of February 18, 1998. Magistrate Grattan issued his opinion on October 11, 1998. He ruled that the plaintiff's hypoglycemic motor vehicle accident arose out of and in the course of employment with Total Petroleum. He issued an open award of benefits, rejecting all of Total Petroleum's defenses. (376a).

Total Petroleum filed its claim for review with the Workers' Compensation Appellate Commission (WCAC) on April 27, 1998. Total Petroleum filed its request for an extension of time to file its brief on appeal, up to and including August 7, 1998. The plaintiff filed his response brief on or about November 10, 1998.

The WCAC issued its decision on October 26, 1999, reversing the Magistrate's decision. The WCAC concluded that the plaintiff's injuries did not arise out of his employment. Instead, the WCAC concluded the plaintiff's injuries arose from a personal risk associated with his diabetes. The fact that his diabetic seizure occurred while driving a motor vehicle when he was making a bank deposit did not transform a personal risk into the compensable injury. The common, everyday act of driving a motor vehicle was insufficient to establish a nexus to his employment. In this regard, the WCAC stated on page 5 of its decision:

> We similarly find the instant case is a personal risk case and that the risk emanates from the plaintiff's non-work-related diabetic condition. We find the magistrate legally erred in finding that the

> mere act of a plaintiff's driving a vehicle in the course of employment increased the risk of injury. We carefully examined the record and while duly cognizant of the deference to be given to the decision of the magistrate we find grounds for reversal upon application of *Ledbetter* and *Auto Club of Michigan* to the found facts of this case. Therefore, we reverse the magistrate's decision. (396a).

Plaintiff filed an application for leave to appeal to Michigan Court of Appeals. Intervening plaintiff-appellee, AAA of Michigan, filed its own cross-appeal. Total Petroleum filed its answer in opposition to the application for leave to appeal on December 17, 1999. The Court of Appeals granted the application for leave to appeal on April 12, 2000. (399a). The plaintiff filed his appeal brief on June 23, 2000. Total Petroleum filed its appellee's brief in July 27, 2000, and AAA of Michigan filed its brief on August 8, 2000. Total Petroleum filed its response brief to AAA's brief on September 11, 2000. The Court of Appeals entertained all arguments on December 3, 2000. The Court of Appeals consolidated this appeal with another appeal involving the same issue. (400a).

On May 11, 2001, the Court of Appeals issued its decision which it designated for publication. (401a). The Court of Appeals reversed the WCAC's decision. The Court of Appeals expressly rejected the WCAC's reasoning that driving is an everyday activity. The Court of Appeals determined that the plaintiff's injuries were compensable, even if caused by a personal risk. (407a - 408a).

Total Petroleum filed an application for leave to appeal to the Michigan Supreme Court on June 1, 2001. The Michigan Supreme Court granted leave to appeal on January 23, 2002. (409a). Total Petroleum now files its Appellant's brief.

ARGUMENT

There are three reasons why the Court of Appeals' decision is incorrect. First, the Court of Appeals' decision is unfaithful to the two prong standard for awarding worker's compensation benefits. The "arising out of" requirement made little impression on the Court of Appeals. The Court of Appeals' indifference to this causation element makes it impossible to reconcile its decision with the Supreme Court case of *Van Gorder v Packard.* Secondly, the Court of Appeals' decision exhibited little deference to the administrative expertise of the Worker's Compensation Appellate Commission, and in this regard the Court of Appeals violated the Appellate Standard of Review. Thirdly, the Court of Appeals misapplied the *Ledbetter* holding and all but eviscerated the personal risk doctrine under Michigan's Workers' Disability Compensation Act.

I. The Court of Appeals' Decision Contradicts *Van Gorder v Packard Motor Car*, 195 Mich 588; 162 NW 107 (1917).

Michigan's Workers' Disability Compensation Act (Act) requires a plaintiff to establish two elements in order to be entitled to benefits. The plaintiff must demonstrate that the injury arose during the course of employment, and secondly the plaintiff must demonstrate that the injury arises out of the employment. Section 301 of the Act, MCL 318.301; MSA 17.237(301) incorporates both these elements. This section states in relevant part:

> An employee, who receives a personal injury **arising out of and in the course of employment** by an employer who is subject to this act at the time of injury, shall be paid compensation as provided in this act. (Emphasis added.)

The statute does not impose strict liability on an employer for every conceivable trauma that may occur in the work place. Although the Act is to be liberally construed in favor of awarding

benefits, the fact that Section 301 contains the phrase "arising out of and in the course of employment" means that the actual cause of the personal injury must have some nexus to the work place.

These two requirements in Section 301 have remained essentially unchanged since the enactment of the Workers' Disability Compensation Act in 1912. The statute at that time contained the same two elements: the accident must have (1) occurred in the course of employment and (2) arose out of the course of employment. *See Van Gorder v Packard Motor Car Co*, 195 Mich 588, 598; 162 NW 107 (1917).

In the case here, the direct and immediate cause of the automobile accident which lead to the plaintiff's injuries had nothing to do with his employment. The direct and immediate cause of plaintiff's accident was the result of a hypoglycemic reaction associated with his diabetes. Total Petroleum did not cause or contribute to the plaintiff's diabetes, nor did Total Petroleum cause or contribute to the plaintiff's hypoglycemic reaction. The immediate cause of this accident derived from a personal medical condition unique to this plaintiff.

This case is controlled by the Michigan Supreme Court case of *Van Gorder v Packard Motor Car Co*, 195 Mich 588; 162 NW 107 (1917). In *Van Gorder*, the plaintiff decedent sustained a fatal injury in the course of his employment when he fell from a scaffold approximately six feet from the ground, sustaining a head injury which resulted in his death. The factual finding attributed the fall to an episode of epilepsy. The lower tribunal awarded benefits because it reasoned that falling from a scaffold was one of the dangers incident to the employment and because the fall from the scaffold caused the death. *Id* at 589 - 590.

The Michigan Supreme Court reversed this finding. In finding for the employer, the Supreme Court addressed the very same issue that is central to the appeal here. The Michigan Supreme Court readily acknowledged that the injury occurred in the course of employment, but the statute required something more; the injury must "arise out of the employment." In this regard, the Michigan Supreme Court commented: "it is not sufficient that it arose during the employment, if it arose out of something else." In *Van Gorder*, the Supreme Court concluded that the injury arose out of the decedent's epilepsy. In analyzing the statute, the *Van Gorder* court stated:

> Our own case has clearly recognized the rule that in order to render the employer responsible there must be a concurrence of the two elements: (1) that the accident occurred in the course of employment; and (2) that it arose out of it. If it did not arise out of the employment, but arose out of something else, the employer is not liable. We must adhere to the construction of this statute, if any force or effect is be given the expression arising out of the employment. *Id* at 598.

In applying this analysis to the facts in *Van Gorder*, the Michigan Supreme Court concluded that the six foot scaffolding did not cause the accident. Instead, the immediate causation of the accident was the epileptic fit. In this regard the Supreme Court reasoned:

> In the instant case the deceased was performing the ordinary services of his trade, that of a plumber and steam fitter. He was standing on a scaffold a few feet from the floor. There is no claim that the scaffold was improperly constructed or in any way unsuitable for the service. Due to no conditions arising out of his employment, but solely to his predisposition to epilepsy, which his employer had no notice, he fell from the scaffold, receiving an injury from which death resulted. The fall was caused and caused only by the epileptic fit. The fit was the direct and only cause of his injury. We do not think it would be seriously contended that had he fallen in an epileptic fit while standing on the floor and received the injury he did, that the injury arose out of the employment, and that the defendant was liable. The height from which he fell, here only a short distance, could not change the liability for the injury. The most that can be said is that

> the height from which the deceased fell may have aggravated the extent of the injury. A person falling a greater distance may be more seriously injured than one falling a lesser distance; but it does not change the question responsibility, of liability. The distance of the fall might contribute to the extent of the injury, but it was not a contributory cause to the fall when the deceased was seized with the epileptic fit he would have fallen, no matter where he was, and an employer cannot be held responsible because that unfortunate seizure occurred when the workman was on a scaffold, a few feet from the floor. *Id* at 597-598

Van Gorder is dispositive of this appeal. The plaintiff's automobile accident arose in the course of employment, but the facts are undisputed that it was caused by a personal medical condition - a diabetic seizure. This was the direct and only cause of his injury. The fact that he was in a moving vehicle may have contributed to the extent of his injuries, but the moving vehicle did not cause the accident. His accident did not arise out of the employment, but instead arose out of a personal disease which had no relationship to the work place.

Apparently, *Van Gorder* has only been cited in two subsequent Michigan Supreme Court cases. In *Wilson v Phoenix Furniture Co*, 201 Mich 531; 168 NW 839 (1918), the Michigan Supreme Court refused to apply *Van Gorder* ruling to an industrial accident in which an employee tripped over some nails in a floor, sustaining a scalp wound and two fractured ribs. In *Wilson*, the Michigan Supreme Court ruled that the industrial accident was caused by the nails in the floor which was a work place condition. The Michigan Supreme Court also declined to apply the *Van Gorder* ruling in *Williams v Missouri Valley Bridge & Iron Co*, 212 Mich 150; 180 NW 357 (1920), which concerned compensation for a work related death caused by the bends. The Michigan Supreme Court concluded that the accident, which resulted in the employee's death, was caused by the negligence of another employee.

After being cited in the above two cases, the *Van Gorder* precedent was either ignored or disappeared from Michigan's jurisprudence. Yet, *Van Gorder* remains a valid precedent.

It is impossible to reconcile the *Van Gorder* holding with the Michigan Court of Appeals decision. The Michigan Court of Appeals did not discuss the *Van Gorder* holding. Had it been aware of this holding, it is conceivable that the Court of Appeals may have reached a different result. It is simply not possible to distinguish the key factual components in *Van Gorder* from the factual components in the case here. Both injuries were caused by a personal medical condition. In *Van Gorder*, it was an epileptic fit; and in this case it was a diabetic seizure. In *Van Gorder*, the plaintiff contended that the fall from a six feet tall scaffold contributed to the injury which ultimately resulted in death, and thus arose out of the employment. Here, the Court of Appeals concluded that the act of driving a motor vehicle aggravated the injury and therefore the accident arose out of the employment. (407a). In both *Van Gorder* and the case here, the injury did not arise out of employment, even though it may have arose during the course of employment.

There is no justification for overruling the *Van Gorder* precedent. The overruling of *Van Gorder* would represent a faithless betrayal to the "arising out of" element in Section 301 of the Act. As observed in *Van Gorder*, the Supreme Court must be guided by the construction of the statute. Force and effect are to be given the expression "arising out of." To overrule *Van Gorder* would correspondingly reduce the "arising out of" language to a meaningless phrase.

Furthermore, the "arising out of" element underlies an important policy consideration. In *Van Gorder*, the employee was not even aware of the decedent's epileptic fits. 195 Mich at 597. Likewise, Total Petroleum was not aware of the plaintiff's diabetes or his hypoglycemic reactions. Neither the employer in *Van Gorder* nor Total Petroleum had any control over the personal medical

condition of their employee. Between Total Petroleum and the plaintiff, obviously the plaintiff had substantially more control over monitoring his diabetic condition and preventing the hypoglycemic reaction. There is simply no training which Total Petroleum could have provided to the plaintiff to prevent the cause of his accident. There was nothing Total Petroleum could have done to make the plaintiff's work environment more safe to prevent the accident.

Even if Total Petroleum knew about the plaintiff's diabetes, this would not have prevented Total Petroleum from employing him. Total Petroleum's refusal to employ the plaintiff with his diabetic condition would have, of course, risked a violation of Michigan's Persons with Disabilities Act, MCL 37.1101; MSA 3.550(101), *et seq.* and the American's with Disabilities Act, 29, USC 12101, *et seq.* These laws afford considerable protection to ensure fair employment opportunities for persons who do suffer from a wide range of physical and mental conditions. Thus, the *Van Gorder* precedent, despite its venerable age, is arguably even more important today in light of the protections offered to employment candidates with physical and mental disabilities. The personal risk doctrine is crucial in balancing risks arising from employees' personal medical conditions. Therefore, the *Van Gorder* precedent should be declared valid and applied to this case.

II. The Michigan Court of Appeals' Decision Failed to Apply The Correct Standard of Appellate Review

Judicial review for WCAC decisions is not without reservation. By statute and case law, some deference is owed to the WCAC. The Michigan Court of Appeals' decision demonstrated a lack of deference to the WCAC's administrative expertise.

The standard of judicial review of the WCAC's decision is contained in Section 861a of the Act, MCL 418.861a(14); MSA 17.237 (861a)(14), which states as follows:

> The findings of fact made by the Commission in acting within its powers, in the absence of fraud, shall be conclusive. The Court of Appeals and the Supreme Court shall have the power to review questions of law involved with any order of the Commission, if application is made by a grieved party within 30 days after the order or any affidavit permissible under the Michigan Court Rules.

Although WCAC decisions may be reviewed on questions of law, the Michigan Supreme Court has clearly ruled that even on questions of law, some deference is owed to the administrative expertise of the WCAC. The Michigan Supreme Court stated in *Holden v Ford Motor Co*, 439 Mich 257, 268-269; 484 NW2d 227 (1992):

> Due deference should be given to the administrative expertise of the WCAC, as well as to the administrative expertise of the magistrate. Recognition that a WCAC panel brings to the table the administrative expertise of more than one person may, depending upon the factual or legal issue, be appropriate.
>
> A carefully constructed opinion by the WCAC enables the Court of Appeals and this Court to determine whether the WCAC duly recognized and observed the limitations on its reviewing function contemplated by the substantial evidence standard. If the opinion is carefully constructed, the reviewing court should ordinarily defer to the collective judgment of the WCAC unless **it is manifest that it exceeded its reviewing power.**
>
> We do not now offer a judicial standard in exegesis of the legislative stated standard. It is appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal or, if it is granted, to affirm, in recognition that the Legislature provided for an administrative appellate review by a seven-member WCAC of decisions of 30 magistrates and bestowed on the WCAC final fact finding responsibility subject to constitutionally limited judicial review. (Emphasis added.)

Thus, according to *Holden*, extraordinary deference is owed to the WCAC in this highly technical area of law.

The Michigan Supreme Court reaffirmed the *Holden* standard of appellate review for WCAC decisions in *Mudel v Great A&P Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). The Michigan Supreme Court expressed a concern in *Mudel* over the confusion that existed in the Michigan judiciary over the appropriate standard of review for WCAC decisions. *Id* at 704. The *Mudel* decision again characterized the *Holden* standard of appellate review as "extremely differential."

The Court of Appeals did not display even a moderate deference, let alone extreme. The question before the Court of Appeals really was whether the WCAC exceeded its authority in determining that an automobile accident in the course of employment, that was directly caused by a personal risk, was not compensable under the Act. In particular, the Michigan Court of Appeals should have examined whether the WCAC's common everyday activity approach to the Personal Risk Doctrine was repugnant, or otherwise contrary to the act. In actuality, the WCAC's analysis gives force and effect to the "arising out of" language in the statute. Yet, the Court of Appeals criticized the WCAC for applying erroneous legal reasoning and operating within an "incorrect legal framework." (405a). The Court of Appeals was especially critical of the WCAC's conclusion that driving an automobile is a common everyday activity which does not provide significant nexus to the work place to make an injury arising out of a personal risk compensable under the act. (407a). Yet, the Court of Appeals failed to explain how this interpretation was unreasonable, contradicted, or was repugnant to the Act.

The Court of Appeals relied heavily on Larson's Treatise on Workers' Disability Compensation law. Larson's does describe that the prevailing viewpoint among other state

jurisdictions is to award compensation in these types of cases. *See Bennett* v *Wichita Fence Co*, 16 Kan App 458, 460; 824 P2d 1001, 1003 (Kan App, 1992); *National Health Laboratories* v *Industrial Claim Appeals Office of Colorado*, 944 P2d 1259, 1260-61, (Colo App, 1992); *Workers' Compensation Appeal Board* v *United States Steel Corp*, 31 Pa Cmwlth, 329, 335; 376 A2d 271 (Pa, 1977). Larson's is an excellent treatise on workers' compensation law; however, Larson's is not determinative of Michigan law. The Michigan Legislature did not codify Larson's Treatise into the statute. Certainly, Larson's cannot supercede a Michigan Supreme Court precedent. The key question on this appeal is whether WCAC's interpretation of the scope of liability in Section 301 is contrary to law, which presumably means Michigan law as embodied in its statutes and as interpreted by the Michigan Supreme Court. The question is not whether the WCAC's interpretation is inconsistent with a legal treatise.

Thus, the Court of Appeals' heavy reliance on Larson's only serves to highlight its lack of deference. Rather than place any trust in the Administrative Agency which is authorized to interpret and enforce the Act, the Michigan Court of Appeals instead attached greater importance to a general treatise on workers' disability compensation law which discusses workers' compensation issues in all 50 states. The fact that a legal commentary describes a "majority rule" should not be dispositive of the case. Elevating the comments of a general treatise over WCAC's interpretation is inimical to the concept of extreme deference.

In addition, while the Court of Appeals was highly critical in the WCAC's legal reasoning in connection with the Personal Risk Doctrine, the Court of Appeals failed to articulate any legal frame work for analyzing Personal Risk Doctrine. Aside from disagreeing with the WCAC's legal analysis, the Court of Appeals never really identified what legal frame work was correct. Without

explicitly stating the obvious, the Court of Appeals basically vitiated the Personal Risk Doctrine. If common everyday activities, whether performed at work or away from work, are sufficient to make the employer liable even for a personal risk uniquely associated with the employee, then the "arising out of" language in Section 301 is reduced to an inefficacious nulity.

In actual fact, the WCAC's common everyday analysis is a logical, common sense approach for analyzing personal risk. Certainly, operation of a motor vehicle fits within the common everyday experience. The Court of Appeals' decision should have at least explained exactly how the WCAC exceeded its authority or violated the Act. The Michigan Court of Appeals' decision especially should have explained how the WCAC's reasoning was inconsistent with "arising out of" element in Section 301.

III. The Michigan Court of Appeals Decision Misapplied the *Ledbetter* Decision.

The Michigan Court of Appeals decision is incompatible with the decision of the Michigan Court of Appeals in *Ledbetter v Michigan Carton Co*, 74 Mich App 330; 253 NW2d 753 (1997). The Michigan Court of Appeals in effect has restricted the personal risk doctrine to the specific facts in *Ledbetter* which involved a fatal accident from an idiopathic fall on a level concrete floor.

In contrast, the WCAC's analysis actually falls squarely within the personal risk doctrine as articulated by the Michigan Court of Appeals in *Ledbetter*. In *Ledbetter*, the Michigan Court of Appeals reasoned that if an employee sustains an injury caused by a personal risk, such as a seizure unrelated to the employee's employment, then the injury is not compensable, even though the injury may have occurred at work or in the course of employment. In reaching this conclusion, the Court of Appeals stated:

> While this Court affirmatively believes in the principle that an employee should be responsible for work-related injuries and their employees, we do not feel such a responsibility should be stretched to include injuries predominately personal to the employee. *Id* at 336.

The Court of Appeals decision here actually rejected the *Ledbetter* analysis. The Court of Appeals incorrectly reasoned that if the personal risk injury is aggravated by the work place environment, then the injury is still compensable, even though the initial causation is attributable to a personal risk. Hence, the Court of Appeals reasoned that the everyday act of driving an automobile aggravated the personal risk incident. (407a).

This conclusion is incongruent with *Ledbetter's* analysis. It is true that in *Ledbetter* the Court of Appeals did acknowledge that an idiopathic incident would still be compensable in certain types of aggravation, such as falling into some type of machinery. *Id* at 337. However, *Ledbetter* established a test for determining whether an idiopathic event at work should be compensable. "If it cannot be said with certainty that an accident would be less serious had it occurred away from work, then the idiopathic accident is not compensable under the act." The *Ledbetter* court stated:

> The plaintiff's remaining argument for compensation is that the concrete or cement floor through which the decedent fell aggravated his injury. Although we recognize that a fall onto a softer surface may have lessened the impact, we are not convinced that the composition of the floor necessarily aggravated the harm. It cannot be said with certainty that had the fall occurred at a different location, away from the employer's premises, the injuries would have been less serious. *Id.*

The act of driving fails this test of certainty. It cannot be said with certainty that had the plaintiff's hypoglycemic seizure occurred away from work, his injuries would have been any less serious. Perhaps his injuries would have been more severe. He might have suffered the seizure while commuting to and from work, or he could have suffered the seizure while engaged in a

personal excursion. Driving an automobile did not increase the plaintiff's risk of experiencing a seizure or risk of injury. The fact that the plaintiff could experience a diabetic reaction while driving his car, while in the course of employment, commuting to or from work, or in personal business, is basing liability on a purely fortuitous event.

Once again, imposing liability makes no sense from a public policy standpoint. Arguably, holding the employers liable for work place accidents forces them to be more concerned about safety in their work environment. It bears repeating, that there is nothing that Total Petroleum could have done to make the work environment more safe against the plaintiff having an unpredictable, hypoglycemic reaction. The operation of a motor vehicle, an everyday event, should not automatically transform a personal risk into a compensable event. *Ledbetter* provided the touchstone for determining when to apply the Personal Risk Doctrine. If it cannot be said with certainty that had the accident occurred at a different location away from the employer's premises the injuries would have been less serious, then the Personal Risk Doctrine should apply. In this case it cannot be said with certainty that had the plaintiff been driving his car home from work, that his injuries would have been less serious or more serious.

The Court of Appeals' decision compared driving a car to a cook using a knife in a kitchen or to a lifeguard swimming. In these scenarios, the Court of Appeals concluded that if a plaintiff was a butcher or lifeguard and lost consciousness while carving meat or saving a swimmer and suffered injuries, then that employee should not be denied benefits in those circumstances. (407a).

These are false analogies. Putting aside the issue of whether swimming, for example, is an everyday activity, the question which the Court of Appeals ignores is what caused the initial loss of consciousness. If the initial loss of consciousness is caused by a personal medical condition, then

if in fact the activity is a commonplace, everyday activity, it should not be a compensable event; at least it should not be compensable if the "arising out of" element has meaning. The Court of Appeals' contrary reasoning ignores the "arising out of" element in Section 301.

Therefore, the Court of Appeals did not properly construe and apply the *Ledbetter* personal risk doctrine. In contrast, the WCAC's decision and analysis remained faithful to the *Ledbetter* analysis and statutory language of Section 301. The WCAC's decision should be reinstated.

CONCLUSION AND RELIEF REQUESTED

The phrase "arising out of" in Section 301 presumably has meaning. The Michigan Supreme Court already gave this element of liability effect in *Van Gorder* which not only provides firm guidance, but is actually dispositive of this appeal. Despite the passage of time, there is absolutely no reason to overrule *Van Gorder*. In order to give meaning to the "arising out of" element, there must be some nexus between the causal event and the work place.

In this case, the plaintiff's seizure from a diabetic hypoglycemic reaction arose out of a personal risk unique to him. Total Petroleum had no ability to control or monitor the plaintiff's diabetic condition. Total Petroleum's work environment did not cause the plaintiff's diabetic condition nor did it cause his seizure. Compelling the employer to compensate for this injury ignores the arising out of language and bases liability on a fortuitous event, because as properly noted by the WCAC, driving a motor vehicle is an everyday occurrence and part of the heart of life. In reversing the WCAC, the Michigan Court of Appeals showed little regard for the WCAC's administrative expertise and for the personal risk doctrine as described by *Ledbetter*, but most importantly, it showed little regard for the "arising out of" language of Section 301.

WHEREFORE, for the above reasons, the Appellant Total Petroleum, Inc. respectfully requests that the Michigan Supreme Court reverse the decision of the Michigan Court of Appeals and reinstate the decision of the Workers' Compensation Appellate Commission.

Respectfully submitted,

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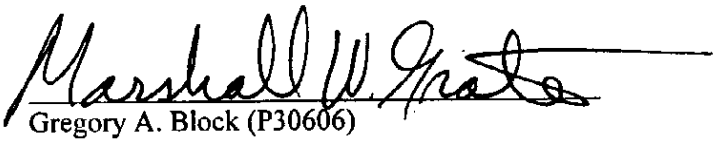

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